WONG SIN MENG

v.

WONG SAM MOI & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. F22-3-1986]
10 JULY 1990

LIMITATION: *Recovery of land - 12 years - Time runs from date right is infringed or threat of infringement - Limitation Act 1953, ss. 6(1), 9(1).*

CIVIL PROCEDURE: *Want of prosecution - Delay in setting the action down for trial - Whether time barred - Whether proper to strike out action before limitation period has expired - Meanings of 'cause of action accrues' 'right of action accrues' 'right to sue accrues' - Legal right to issue fresh writ.*

On 4 March 1989, the 1st defendants D1 made an application to dismiss the plaintiff's action for want of prosecution pursuant of O. 32 r. 2 of Rules of he High Court 1980 on the ground that the plaintiff had failed to set the action down for trial pursuant to the order of the Senior Assistant Registrar issued on 22 October 1987 which required the actions to be set down for trial within 60 days from the day of the order. The solicitors for P set the action down for trial only on 3 March 1989.

At the hearing of the application to dismiss the action, Counsel for the respective parties conceded that the action by that time was already time barred. The application of D1 to dismiss that action was allowed in chambers.

However on 25 August 1989 the solicitors for P requested further argument in Open Court.

The question for the Court at this striking out stage is whether it is proper to strike out the action for non-prosecution before the limitation period has expired.

Held:

[1] The question of the failure on the part of the defendant to plead that the action is time-barred does not arise; even if P's action was within the limitation period, upon the defendant's application to strike out the action for non-prosecution, should the Court find that the action had by then been time-barred, the action could be struck out if the ingredients for striking out were applicable regardless of the pleadings of the parties.

[2] The Court applied the principles in *Nasri's* case, where it was held that where the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover land and the period of limitation is 12 years (see ss. 6(1) and 9(1) Limitation Act 1953).

[3] The expressions 'the right to sue accrues', 'the cause of action accrues' and the 'right of action accrues' mean the same thing when one speaks of the time from which the period of limitation as prescribed by law should run; time runs from the date on which that right is infringed or when there is a threat of its infringement.

[4] When P took out a summons-in-chambers in applying for summary judgment and this application was opposed by the defendants, such opposition constituted an unequivocal threat to infringe the right of the plaintiff. The limitation period therefore commenced to run at the earliest on or about that time and the limitation period applicable to P's action will expire only 12 years from that date.

[5] If P's action was dismissed it is likely that P would avail himself of his legal right to issue a fresh writ; therefore the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending.

[Earlier order in chambers reversed; D's application dismissed.]

Cases referred to:
Allen v. Sir Alfred MaAlpine & Sons Ltd. [1968] 2 QB 229
Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125
Birkett v. James [1978] AC 297
Datuk Samy Vellu v. Karpal Singh [1990] 2 CLJ (Rep) 4
Ho Ah Kim v. Paya Trubong Estate Sdn. Bhd. [1987] 1 MLJ 143
Mt. Bolo v. Mt. Koklan and Ors. [1930] AIR PC 270
Munah v. Fatimah [1968] 2 MLJ 54
Nasri v. Mesah [1971] 2 MLJ 32
Ponnusamy & Anor. v. Nathu Ram [1959] MLJ 86

Legislation referred to:
Limitation Act [Ind], art. 120
Limitation Ordinance 1953, ss. 9, 9(1)
Rules of the High Court 1980, O. 34 r. 2

For the plaintiff - Victoria Ng; M/s. Y.K. Ng & Co.
For the 1st defendant - Raj Kumari; M/s. Lewis & Co.

JUDGMENT

Lim Beng Choon J:

An application dated 4 March 1989 was made by the 1st defendant in this case to dismiss this action of the plaintiff for want of prosecution pursuant to O. 34 r. 2 of the Rules of High Court 1980 on the ground that the plaintiff had failed to set this action for trial pursuant to the order of the Senior Assistant Registrar issued on 22 October 1987 which required the action be set down for trial within 60 days from the date of the order.

The history of the proceedings leading to the defendant's application may be stated as follows.

The writ action was instituted on 17 December 1985 by the purported personal representative of the Estate of Wong Chiow Nyong deceased against the purported representative of the Estate of Chan Kon Leong deceased as the 1st defendant and the Malaysia Building Societies Berhad as the 2nd defendant. I use the word 'purported' to describe the personal representatives of the respective estates of the two deceased persons because apparently at the time of the institution of the action no one had been appointed as personal representative to administer the estates. Although an application was made by the 'plaintiff' on 6 January 1986 for an order to appoint one Wong Sin Meng to represent the estate of Wong Chiow Nyong and one Madam Wong Sam Moi @ Ng Sau Ling to represent the estate of Chan Kon Leong, the application was heard by the Senior Assistant Registrar of the Court (SAR) only on 17 April 1986 when the SAR made an order in terms of the application to appoint the two persons named in the application to represent the respective estates. The step taken by the personal representative of the estate of Wong Chiow Nyong is to my mind, an extremely unusual one. However that may be, as none of the parties deemed it fit to raise this matter as an issue for me to consider, I do not think I should deal with it at this stage. In the statement of claim the plaintiff claimed that at all material times the property held under HS(D) 7425 Lot 43 Mukim of Petaling Jaya, District of Petaling with a house erected thereon known

as No. 43, Jalan 14/1, Petaling Jaya (the property) was owned by the 2nd defendant. Chan Kon Leong, since deceased, purchased the property on a loan from the 2nd defendant. By a verbal agreement the late Chan Kon Leong allowed Wong Chiow Nyong since deceased to reside in the property in consideration of the late Wong Chiow Nyong paying for all instalment payments on the said loan obtained from the 2nd defendant. It was also verbally agreed that the late Chan Kon Leong would remain the nominal purchaser of the property and upon completion of the payment of the loan instalments to the 2nd defendant by the late Wong Chiow Nyong, the property would be conveyed directly to the latter. Based on these arrangements the late Wong Chiow Nyong and his family entered into possession of the property in 1959 and had been residing there ever since. The late Wong Chiow Nyong made payments of the loan instalments regularly and on or about 27 May 1974 the said loan was completely settled by the late Wong Chiow Nyong. Furthermore as at 19 April 1975 the late Wong Chiow Nyong also made various payments towards quit rent, assessments and miscellaneous payments amounting to RM10,565.29 in respect of the property. It is not stated in the statement of claim as to when Chan Kon Leong or Wong Chiow Nyong died. However that may be, after the death of the two persons, the beneficiaries of the estate of Wong Chiow Nyong wrote to the widow of the late Chan Kon Leong to request that the property be conveyed to the plaintiff. Despite repeated reminders and requests the said widow and/or the 1st defendant have failed and/or neglected to instruct the 2nd defendant to convey the property to the plaintiff. The plaintiff therefore claims:

(a) a declaration that on the true construction of the said verbal agreement and in the events which have happened the legal owner of the property is the plaintiff.

(b) an order that the 1st defendant do forthwith instruct the 2nd defendant to convey the said property to the plaintiff.

(c) an order that the 2nd defendant do forthwith convey the said property to the plaintiff.

(d) an order that the Senior Assistant Registrar be at liberty to sign the transfer of the said property in favour of the plaintiff.

(e) and further or in the alternative the 1st defendant do pay the plaintiff a sum equivalent to the market value of the said property.

The writ indorsed with the statement of claim was served on the 2nd defendant on 13 March 1986 and on the 1st defendant Madam Wong Sam Moi @ Ng Sau Ling as personal representative of the estate of Chan Kon Leong on 19 March 1986. As both the defendants failed to enter an appearance a certificate of non-appearance was filed by the plaintiff on 29 May 1986. This was followed by an application made by the plaintiff on 30 May 1986 for summary judgment for the reliefs as prayed in the statement of claim. In his affidavit in support affirmed on 28 May 1986 the personal representative of the estate of Wong Chiow Nyong averred *inter alia* that as at September 1985 a search was made at the relevant Land Office and it was discovered that the property was still vested in the name of the 2nd defendant and the 1st defendant had failed to instruct the 2nd defendant to convey the property to the plaintiff. In further support of his application for summary judgment the plaintiff's former advocate and solicitor, one Chew Ai Man, affirmed an affidavit on 12 January 1987 stating *inter alia* that he was instructed to seek an amicable settlement with the defendant. Accordingly on or about October 1984 he met the 1st defendant and a negotiation took place. The 1st defendant had fully understood the basis of the plaintiff's claim and she was willing and prepared to settle the matter with the plaintiff. All these allegations have not been denied by the defendants. The 1st defendant however filed in her memorandum of

appearance on 18 September 1986. The plaintiff's application for summary judgment was dismissed on 24 August 1987 and the 1st defendant was directed to file her defence within 14 days from the date of the said order. She did file her defence but only on 5 September 1987. Thereafter summons-for-directions was taken out on 22 October 1988 and the plaintiff was directed to set down the action for trial within 60 days as stated earlier.

In considering the matter it is appropriate to take into account the period of delay between the filing of the writ on 17 December 1985 and the date when the summons-for-direction was taken out on 22 October 1988. It is quite clear that during that period the delay was not due entirely through the fault of the plaintiff. The inactivity on the part of the 1st defendant contributed to a certain extent to the delay. Furthermore the plaintiff's solicitors have no control over the time taken by the Court to hear the plaintiff's application for summary judgment. However that may be, upon taking out the summons-for-direction, the action had gone to sleep for nearly 1½ years. It was not until 3 March 1989 that the solicitors for the plaintiff set the action down for trial. Their lack of diligence is inexcusable particularly when the defendant's solicitors had reminded them by letter dated 16th 1988 to do the needful. As stated by Lord Denning in the case of *Allen v. Sir Alfred MaAlpine & Sons Ltd.* [1968] 2 QB 229 at 245:

> It was argued before us that the Court should never, on the first application, dismiss the action. Even if there was long delay, the Court should always give the dilatory solicitor one more chance. The order should be that the action should be dismissed "unless" he takes the next step within a stated time. Such has been the practice, it was said, for a great many years. It was confirmed by Sir George Jessel MR in *Eaton v. Storer* and it should not be changed without prior notice. I cannot accept this suggestion. If there were such a practice, there would be no sanction whatever against delay. The plaintiff's solicitor could put a case on one side as long as he pleased without fear of the consequences.
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> If you read *Eaton v. Storer* carefully, you will see that **the practice described by Sir George Jessel applies only to moderate delays to two or three months**. It does not apply when "there is some special circumstance such as excessive delay." (Emphasis is mine).

Again in *Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125 Lord Denning said at p. 132:

> Even a short delay after the writ may, in many circumstances, be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution.

At the hearing of this application of the defendant to dismiss the action for want of prosecution on 25 August 1989 Counsel for the respective parties conceded that the action is by that time already time barred. Furthermore Counsel for the plaintiff was relying on two points (if I understood her correctly) to contend that the action should not be dismissed. Firstly she said that if there was any delay it was an unintentional oversight and inadvertence on her part. Secondly she submitted that the trial of the case would be based on documentary evidence. Hence the 1st defendant could not be prejudiced by the delay whatsoever by virtue of the issues in question to be decided at the trial of the action. I had occasion to deal with such contentions when I was hearing a case of similar nature where the same contentions had been raised. It will not be profitable to go into details as to why I must hold that such contentions have no merit since my reasons for the rejection of the same contentions in the earlier case had been fully set out in my judgment in that case - see *Datuk Samy Vellu v. Karpal Singh* [1990] 2 CLJ (Rep) 4. I therefore allowed the application of the defendant to dismiss the action of the plaintiff for want of prosecution. However on 25 August 1989 the solicitors for the plaintiff wrote in to request for further arguments in open Court. As I felt

that it is a draconian act to drive the plaintiff from the judgment seat through no fault on his part I therefore allowed the request for further arguments.

At the hearing of the further arguments in open Court, on 20 March 1990. Mr. Sethu appeared with Miss Victoria Ng for the plaintiff. Mr. Sethu was not the Counsel for the plaintiff at the earlier trial. In answer to my question as to whether the plaintiff's action had by then been time-barred, Mr. Sethu submitted categorically that the action was not time-barred. He furnished this Court with his notes of submission in which he asserted, on the time-barred question, that:

(a) limitation must be specially pleaded pursuant to s. 4 of the Limitation Act 1953. In the present case the defendant had never expressly pleaded this issue as a defence, and

(b) as the claim of the plaintiff is that the defendant is holding the property in trust for the plaintiff the doctrine of limitation was not available to the plaintiff.

Point (a) relied by Mr. Sethu is best said and be rejected. The question which this Court has to decide at this striking out stage is whether it is proper to strike out the action for non-prosecution before the limitation period has expired. The question of the failure on the part of the defendant to plead that the action is time-barred does not arise for even assuming for the sake of argument, that the action of the plaintiff were well within the limitation period, nevertheless upon the defendant's application to strike out the action for non-prosecution and should the Court find that the action had by then been time-barred, the action could be struck out if the ingredients for striking out were applicable regardless of the pleadings of the parties.

As to point (b), the proposition of the learned Counsel is far too wide and too general. I took note of the fact that he relied on the following passage of the judgment in the case of *Munah v. Fatimah* [1968] 2 MLJ 54 at 55:

> There is the other point raised by Counsel on behalf of the absent defendant, that is, that the action is time barred. Without going into unnecessary detail it is sufficient for me to say that the case of *Williams v. Greatrex,* to which reference was made in *Kersah's* case, is against the defendant. It was there said that where a plaintiff is in possession of an equitable estate under a contract substantially executed, so that the object of his action is to clothe himself with the legal estate, time will not run at all as this is not that species of laches which will prevail against the equitable title.

It is to be noted that in that case the learned Judge was not concerned with the statutory defence of limitation under the Limitation Act 1953. The learned Judge was considering whether the equitable maxim, delay defeats equity should operate against the plaintiff.

On the question of limitation period the proper law to apply is the Limitation Act 1953. This is well illustrated in the case of *Nasri v. Mesah* [1971] 2 MLJ 32 where the Federal Court made an exhaustive review of the case law on the issue of limitation. The brief facts of the case can be seen from the headnote where it is stated that:

> The appellant claimed for specific performance of an agreement dated 5 June 1947 whereby the respondent agreed to sell to him some land belonging to her. The appellant had paid the agreed price of the land but no document of transfer was executed because of the moratorium then in force. After the expiration of the moratorium on 30 September 1949 the appellant approached the respondent on several occasions and requested her to execute a transfer of the land. Eventually the appellant commenced the action on 3 March 1967. The action was dismissed in the High Court on the ground of limitation. The appellant appealed.

The sole question which the Federal Court was asked to answer was whether the action was brought after the limitation period pursuant to s. 9(1) of the Limitation Ordinance 1953 which reads:

> No action shall be brought by any person to recover any land after the expiration of twelve years **from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims to that person.**
> (Emphasis is mine).

In allowing the appeal Gill FJ held that in that case whether the action was for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover land and the period of limitation would be twelve years. In arriving at the conclusion the learned Chief Justice cited with approval the following passages of the judgment of Thomson CJ in *Ponnusamy & Anor. v. Nathu Ram* [1959] MLJ 86:

> As I put it colloquially this morning in the course of discussion with Counsel, what the plaintiffs are doing is this. They are coming to the Court and saying "we are entitled to this land and we want this land." And if the Court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of s. 9 of the Limitation Ordinance (No. 4 of 1953).

and

> Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s. 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract the period of limitation shall be six years but that provision is expressly stated to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

I am not only bound by the Federal Court decision in the *Nasri* case but with due respect I adopt fully the principles enunciated in that case. If a further authority is necessary I would like to cite *Ho Ah Kim v. Paya Trubong Estate Sdn. Bhd.* [1987] 1 MLJ 143 where Mohamed Dzaiddin J applied the principles laid down in the *Nasri* case.

Having disposed of the question as to the period of limitation in relation to an action for the recovery of land I must now come to the question as to when such limitation begins to run. In *Mt. Bolo v. Mt. Koklan and Ors.* [1930] AIR PC 270 the Privy Council had occasion to deal with this issue in the course of its interpretation of Article 120 of the Indian Limitation Act which provided that the limitation would commence to run "when the right to sue accrues." The Privy Council said in that case that:

> There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement **or at least a clear and unequivocal threat to infringe that right** by the defendant against whom the suit is instituted.
> (Emphasis is mine).

It is to be noted that while Article 120 of the Indian Limitation Act speaks of "right to sue", s. 9 of our Limitation Act 1953 uses the words "the right of action accrued". The question that has to be asked is whether there is any distinction between the accrual of a right to sue and the accrual of a cause or right of action? In the Federal Court case of *Nasri v. Mesah*, Gill FJ in holding that there is no distinction between the two phrases said at p. 34:

In *Board of Trade v. Cayzer, Irvine & Co.* Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild*.) In the case of actions founded on any other right, time runs from, the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land.

Applying the principles discussed above to the facts of the present case, I note from the pleadings of the plaintiff that there has been no unequivocal refusal on the part of the 1st defendant to convey the property to the plaintiff. The plaintiff merely pleaded that "despite repeated reminders and requests to the widow of Chan Kon Leong and/or the 1st defendant to convey the said property to the plaintiff, they have **failed and/or neglected** to instruct the 2nd defendant to convey the property to the plaintiff." This averment shows that despite the requests made by the plaintiff for the conveyancing of the property to him, the defendant has omitted or and/or neglected to comply with their requests; there has been no positive statement made by the defendant that she is not going to convey the property to the plaintiff. There is therefore no infringement of or any threat to infringe the right of the plaintiff for the conveyance of the property to them. This proposition finds support from the fact that the then advocate and solicitor of the plaintiff carried out negotiation with the defendant in October 1984 when the latter "was willing and prepared to settle the matter with the plaintiff." Despite this promise to settle, the plaintiff realised that she had failed to abide by her promise when upon a search made by him at the relevant Land Office in September 1985, he found that the property was still registered under the name of the 2nd defendant. Thereafter the plaintiff filed this suit on 17 December 1985.

From the above narration of the events, there is no evidence that there was ever an infringement or a clear and unequivocal threat of an infringement of the right of the plaintiff. In the circumstances it may be argued that the action brought by the plaintiff in the present case was premature, but that was not the stand taken by the defendant. In any event the service of the writ on the defendant constituted notice of the plaintiff's intentions to assert his right. When the plaintiff took out a summons-in-chambers in applying for summary judgment and his application was opposed by the defendant on 8 October 1986, such opposition likewise constituted an unequivocal threat to infringe the right of the plaintiff. In any event the filing of the defence of the 1st defendant in opposition on 4 September 1987 to the claim by the plaintiff is equally an unequivocal threat to infringe the right of the plaintiff - see *Nasri v. Mesah* (*supra*). The limitation period therefore commenced to run at the earliest on or about 8 October 1986. The limitation period applicable to the plaintiff's action will expire only 12 years from that date.

The next important question is whether it is proper to strike out the plaintiff's action before the limitation period has expired? The answer to this question can be found in the following passage of the judgement of Lord Diplock in *Birkett v. James* [1978] AC 297 at 320:

Crucial to the question whether an action ought to be dismissed for want of prosecution before the expiry of the limitation period is the answer to a question that lies beyond it, *viz*., whether a plaintiff whose action has been so dismissed may issue a fresh writ for the same cause of action. If he does so within the limitation period, the effect of dismissing the previous action can only be to prolong the time which must elapse before the trial can take place beyond the date when it could have been held if the previous action had remained on foot. Upon issuing his new writ the plaintiff would have the benefit of additional time for repeating such procedural steps as he had already completed before the action was dismissed. This can only aggravate; it can never mitigate the prejudice to the defendant from delay.

It is an attractive argument that if a Court has power to dismiss an action already started because it considers that the time which the plaintiff has allowed to elapse since his cause of action first accrued has resulted in a substantial risk that justice may not be done to the defendant at the trial, the Court, by parity of reasoning, should also have power to prevent a fresh action being started. This begs the very question that your Lordships must decide. It assumes that the Court has power to treat as amounting to inordinate and inexcusable delay in proceeding with an action a period shorter than that within which Parliament by a Limitation Act has manifested its intention that a plaintiff should have a legal right to commence proceeding with his action. No one has been bold enough to argue that if the plaintiff has not issued a previous writ he could be deprived of that right at the discretion of a Judge because the Judge thought that in the circumstances of the particular case the statutory limitation period was too long. So in such a case, at any rate, time elapsed before issue of the writ which does not extend beyond the limitation period cannot be treated as inordinate delay; the statute itself permits it.

On the principle enunciated by Lord Diplock, I am of the opinion that in the present case where it is likely that if the plaintiff's action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending. I must therefore reverse my earlier decision made in chambers and dismiss the application of the 1st defendant to strike out the plaintiff's action for non prosecution. In the circumstances of the case I think it is fair and reasonable to order that costs be in the cause.

Also found at [1991] 2 CLJ 1223